CRIMINAL DEFENSE ATTORNEYS OF MICHIGAN

by Christopher P. Yates, Co-Chair, Rules and Laws Committee
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November 1, 2006

The Honorable Clifford W. Taylor
Michigan Supreme Court
Post Office Box 30052
Lansing, Michigan 48909

Re: *ADM File No. 2005-19*

Dear Chief Justice Taylor:

On behalf of the Criminal Defense Attorneys of Michigan ("CDAM"), I am writing to express the objections of CDAM to three specific proposals contained in ADM File No. 2005-19. First, CDAM opposes the proposed version of MCR 2.513(I) that would "permit the jurors to ask questions of witnesses" in the discretion of the trial court. Second, CDAM does not support the proposed version of MCR 2.513(K) that would allow jurors "to discuss the evidence among themselves in the jury room during trial recesses." Finally, CDAM objects to the proposed version of MCR 2.513(M) that would empower the trial court to "fairly and impartially sum up the evidence and comment to the jury about the weight of the evidence[.]" This letter provides the bases for these three objections.

I. Proposed MCR 2.513(I) – Juror Questions.

Although CDAM recognizes that there may be some benefits in allowing jurors to pose questions to witnesses, as proposed MCR 2.513(I) would permit, CDAM believes that the risks inherent in juror questions outweigh the benefits of the practice. The concerns of CDAM have been succinctly stated by the United States Court of Appeals for the Sixth Circuit:

> There are a number of dangers inherent in allowing juror questions: jurors can find themselves removed from their appropriate role as neutral fact-finders; jurors may prematurely evaluate the evidence and adopt a particular position as to the weight of that evidence before considering all of the facts; the pace of the trial may be delayed; there is a certain awkwardness for lawyers wishing to object to juror-inspired questions; and there is a risk of undermining litigation strategies.

United States v Collins, 226 F3d 457, 461 (6th Cir 2000).

Jurors lack an understanding of the rules of evidence, and so their questions often may be improper. Collins, 226 F3d at 462. "When a court declines to ask a question, the questioning juror may feel that her pursuit of truth has been thwarted by rules she does not understand." Id. Also, there is "a risk that a sense of camaraderie among jurors may lead them to attach more significance to questions propounded by fellow jurors than those posed by counsel." Id.

To be sure, the United States Court of Appeals for the Sixth Circuit has authorized the use of juror questions, but it has done so only in an especially circumscribed manner designed to address the risks inherent in the practice. Collins, 226 F3d at 464-465. CDAM believes that the best way to avoid the risks of juror questions is to forbid the practice entirely. But if there are to be juror questions in Michigan trial courts, the prophylactic measures outlined by the Sixth Circuit should be adopted to minimize the risks that necessarily accompany juror questions.

II. Proposed MCR 2.513(K) – Mid-Trial Discussion of Evidence.

With respect to proposed MCR 2.513(K), CDAM agrees completely with the Michigan Judges Association, which has written to "strongly oppose juror discussion until they have heard all of the evidence." The proposal to allow trial courts to permit jurors "to discuss the evidence among themselves in the jury room during trial recesses" is antithetical to the concept that juries must render their verdicts based upon all of the evidence presented to them.

The proscription of mid-trial discussion of the evidence by jurors was discussed in detail by the United States Court of Appeals for the Third Circuit in United States v Resko, 3 F3d 684, 688-690 (3rd Cir 1993). There, the court explained that mid-trial discussions by jurors tend to favor the prosecution because the defense cannot present its case until after the prosecution has presented its evidence. Id. at 689. Also, mid-trial discussions cause jurors who express an opinion during the trial "to continue to adhere to that opinion and to pay greater attention to evidence presented that comports with that opinion." Id. In addition, jurors who discuss the evidence during the trial do so without the benefit of instructions, so their discussions may be improperly focused and grounded upon a standard of proof that is lower than proof beyond a reasonable doubt. Id. Finally, "requiring the jury to refrain from prematurely discussing the case with fellow jurors in a criminal case helps protect a defendant's Sixth Amendment right to a fair trial as well as his or her due process right to place the burden on the government to prove its case beyond a reasonable doubt." Id. at 689-690.

The reasoning in Resko demonstrates not only that mid-trial discussion of the evidence by jurors is an unwise policy, but also that such a practice may be unconstitutional. Resko, 3 F3d at 689-690. Consequently, adoption of proposed MCR 2.513(K) may give rise to constitutional challenges both in the Michigan court system and in *habeas corpus* petitions in the federal courts in Michigan. These challenges can be avoided if jurors are foreclosed from discussing the case before the they have heard all of the evidence and received their final instructions from the trial court.

III. Proposed MCR 2.513(M) – Judicial Summations.

The last matter of concern to CDAM is proposed MCR 2.513(M), which would authorize judges to "fairly and impartially sum up the evidence and comment to the jury about the weight of the evidence[.]" Like the Michigan Judges Association, CDAM believes "it would be difficult for the court to comment on the weight of the evidence without disclosing an opinion, and that jurors would be overwhelmingly influenced in their decision-making by the judge's comments." Indeed, it is inconceivable that a trial judge's comments to the jury concerning the weight of the evidence could be set aside by the jury in "determin[ing] for itself the weight of the evidence," yet this is what proposed MCR 2.513(M) contemplates.

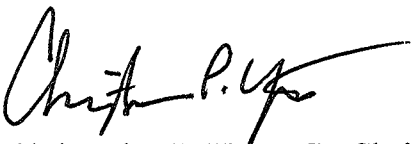
"A defendant in a criminal trial is entitled to expect a 'neutral and detached magistrate.'" People v Cheeks, 216 Mich App 470, 480; 549 NW2d 584, 588 (1996). A judicial summation, which the staff comment accompanying proposed MCR 2.513(M) describes as a summary "much like the attorneys do in closing argument," is entirely at odds with the proper role of a "neutral and detached" trial judge. As the United States Court of Appeals for the Sixth Circuit put it:

> The problem is that potential prejudice lurks behind every intrusion into a trial made by a presiding judge. The reason for this is that a trial judge's position before a jury is overpowering. His position makes his slightest action of great weight with the jury.

United States v Hickman, 592 F2d 931, 933 (6th Cir 1979) (citations omitted). There can be no greater intrusion by a trial judge than a judicial summation "much like the attorneys do in closing argument." Simply put, a fair trial is impossible if the trial judge "comment[s] to the jury about the weight of the evidence," as contemplated by proposed MCR 2.513(M).

On behalf of the Criminal Defense Attorneys of Michigan, I thank the Michigan Supreme Court for the opportunity to comment on the proposed rule changes in ADM File No. 2005-19.

Sincerely,



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